



April 12, 1999

Ms. Linda Wiegman
Supervising Attorney
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR99-0974

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#123295.

The Texas Department of Health ("TDH") received a request for "a copy of the entire file of Pecan Hill Ranch." You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b. We have considered the exception you claim and reviewed the submitted information.

Government Code section 552.301(a) requires a governmental entity seeking to withhold public information to submit a request for a decision to the attorney general "not later than the 10th business day after the date of receiving the written request." Government Code section 552.302 states: "If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information." This legal presumption that the requested information is open to the public may be overcome only by a demonstration of a compelling interest. *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). A demonstration that the requested information is deemed confidential by law is a compelling interest sufficient to negate this presumption. See Open Records Decision No. 150 (1977).

Section 5.08 the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, provides in part:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). We agree with your MPA markings and conclude that TDH may only release this information in accordance with the MPA.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common-law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). We disagree with your markings of the information that must be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy and we have marked the documents to indicate the information that must be withheld.

There remains the question of information contained in the requested materials which identifies or relates to Medicare and Medicaid recipients. You note that Open Records Letter 98-2321 (1998) stated: "The identities of Medicare and Medicaid patients are made confidential by federal law," citing title 42 C.F.R. section 401.126. As a matter of general application, it appears that statement is too broad.

You cite title 42 C.F.R. section 401.126(b)(1), which provides that information in program validation survey reports and other formal evaluations of providers of services which identifies Medicare or Medicaid patients, individual health care providers, and other individuals must be withheld. The documents submitted consists of Intake Reports, Reports of Contact and other complaint documents. Having examined the records at issue, we do not find that the information

you have marked is required to be withheld under 42 C.F.R. section 401.126(b)(1). We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

David Van Brunt Price

David Van Brunt Price
Assistant Attorney General
Open Records Division

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Ref: ID# 123295

Enclosures: Submitted documents

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(w/o enclosures)